The Central Law Journal.

ST. LOUIS, MARCH 23, 1883.

CURRENT TOPICS.

The lay press and political demagogues have much to say at times concerning what they characterize the superabundance of the legal element in the community. A very fair sample of the sort of vaporing that is current in such circles, is quoted by a contemporary from the columns of the *Evening Journal* of the venerable little burg of Albany, N. Y., to the following effect:

"In all Great Britain and Ireland, with a population approximating 37,000,000, there are between 11,000 and 12,000 lawyers. In the United States, with a population larger by only 15,000,000, there are 65,000 lawyers, and in this State of ours, with a tenth of the country's population, abide a sixth of its entire body of lawyers. It will not do to explain the fact that there is a lawyer to every 3,000 people in Great Britain, while in America there is a lawyer to every 800 people, upon any hypothesis which asserts a marked difference between the needs of the two countries for legal activity. As a matter of fact, we have a ridiculous excess of lawyers over here. In every city east of the Mississippi there are more lawyers than there are legitimate cases in court for them to take care of. * * * * The result of this state of affairs deserves to rank among the most grinding of our social evils. The harm which a professionally united band of men, with invention sharpened by poverty and zeal, robbed of tempering scruples by the pressure of creditors, can do in a community by stirring up litigations among citizens, inciting peaceable folks to sue each other, prolonging cases indefinitely by resort to every quibble and pretext possible under our loosely-drawn laws, and devoting all their collective ingenuity and skill to the work of making business for themselves at the expense of the public—can not well be overestimated. * * * We look to see, sooner or later, a very decided expression of public opinion on this question of the supply of lawyers. In the eyes of the law, they are the officers of the courts. Logically there ought to be a limit to their creation, just as there is a limit to the creation of district attorneys, or constables, or letter-carriers. * * * * Popular opinion has not been directed with much clearness or concentration toward this evil, as yet, but it will be one of these days, and then we take it that a radical—perhaps too radical—reform will be wrought in the whole system."

These remarks, though worthy of no particular consideration in themselves, merit attention in their representative capacity as being a fair sample of what is said and believed by many ignorant and prejudiced persons. But admitting the major premise on which all these dire apprehensions are predicated, *viz.*: that the legal profession is overcrowded, it does not follow that the wicked race of lawyers is the blameworthy cause of this state of affairs. Rather it is the natural outgrowth of our democratic policy, not only of permitting the individual to pursue such avocation as best pleases him, but of rooting out everything savoring of the nature of class privileges. To illustrate, the English bar is a close corporation, and the rules governing the qualifications and preparation for admission to its ranks, are substantially in the control of a committee of its members. Personal interest, as well as tradition and public policy, alike dictate that the coveted honor of admission to its ranks should be bestowed with a sparing and discriminating hand, and only upon such candidates as are able to demonstrate beyond peradventure their fitness according to the standard so established. The result is that the intellectual and moral average of the profession in England is high, and, more especially their numbers are comparatively few. To this extent the effects of the system are good, and, while there is some reason in the view, that such a plan is repugnant to our democratic institutions, which would prevent its toleration in this country, it is nevertheless unfortunate that we have found no adequate substitute for it which accomplishes even in a partial degree the ends there attained. The system of admission upon examination by the court, which is in vogue in most, if not all, of our States, has degenerated in many instances into a mere formality, and salutary regulations are either ignored or evaded. Consequently, the bar in many localities, has been compelled, in deference to a democratic principle, to receive large and undesirable accessions to its numbers.

What is precisely the most effectual remedy for these evils we do not pretend to say; we merely wish, in anticipation of that terrible day of reckoning, which the imaginative journalist of the Albany *Evening Journal* has conjured up, when the great public will arise in its wrath and punish the wicked lawyers, to call attention to the fact that the profession is not the guilty cause of *all* the evils which afflict the country, but that the laws, the legislature, the genius of the people, and the climate, are responsible for a few of them.

CONTEMPT BY OFFICERS OF THE COURT.

The question of jurisdiction frequently arises in contempt cases. The person charged must either be a party to the proceedings, or an officer of the court. The latter list comprises not only those ministerial and executive officers who are attached to the court, but also the attorneys who practice before it. Contempt by attorneys will first be considered, as it involves points of special interest to practitioners. The court will relieve in a summary manner against the misconduct of an attorney in the exercise of his office.[1] Hence an attorney will be punished for contempt in writing a letter to a judge, wherein sneering and insulting language is used concerning a decision rendered by the judge in a cause which the attorney had argued before him.[2] This was the decision where the words thus addressed to the judge were: "The ruling you have made is directly contrary to every principle of law, and everybody knows it, I believe;" and "it is my desire that no such decision shall stand unreversed in any court I practice in." Similarly it is a contempt for an attorney to write and publish strictures on the opinion of the court, in order to prejudice a cause.[3] It is, upon like principles, a contempt for part of the bar of a court to publish a libellous assault upon the integrity or the judge; nor can an attorney in such a case shield himself by the plea that he made such attacks in his capacity of editor of a newspaper.[4] Furthermore, an attorney is liable for contempt,[5] for entering a dismissal of action in disrespectful language;[6] or for unprofessional and disrespectful language before the court;[7] or for filing an indecent petion for divorce;[8] or for instituting a fictitious suit;[9] or for suing out an attachment for a witness who has not been served with process;[10] or failing to pay or replevy a judgment in a bastardy proceeding;[11] or making use of a false instrument in order to prevent the course of justice.[12]

But an attorney is not chargeable with contempt for issuing a precept for costs where an injunction did not prohibit their collection;[13] or for advising a client, if he could not otherwise obtain a continuance, to escape and forfeit his bail on an indictment for assault and battery, and thus secure the desired delay;[14] or for refusing to defend, without a fee, a poor person, although appointed to such duty by the court.[15] So where the facts which are supposed to establish misconduct in an attorney are susceptible of explanation, showing them consistent with professional propriety, the court has no power to adjudge him guilty of contempt, and to strike him from the rolls, without affording him an opportunity for an explanation.[16] For attorneys are officers of the court, and can only be deprived of their offices by judgment of the court after a chance for a hearing.[17] A judgment otherwise rendered, partaking so strongly of the nature of a criminal proceeding, and so serious in its consequences, can not be supported. An attorney, by his admission as such, acquires rights of which he can not be deprived at the discretion of a court, any more than a physician of the practice of his profession, a mechanic of the exercise of his trade, or a merchant of the pursuit of his commercial avocations. It is true that, being officers of the court, attorneys are, in many respects, subject to the orders of the court, but these orders must be the result of sound and legal, and not of arbitrary and uncontrolled discretion.[18]

Again, it has been ruled that the fact that an attorney for clients having different inter-

[1] People v. Smith, 3 Caines, 221; Commonwealth v. Newton, 1 Grant, 453.

[2] *Re* Pryor, 18 Kans. 72.

[3] Matter of Derby, 3 Wheel. C. C. 1; Reg. v. Wilkinson, 41 Up. Can. Q. B.; Higginson's Case, 2 Atk. 469. See for authorities cited, Desty's Crim. L., sec. 73c.

[4] Matter of Moore, 63 N. C. 397. And see *Ex parte* Biggs, 64 N. C. 202; *Ex parte* Greevy, 4 W. N. C. (Pa.) 308. But to the contrary see *Ex parte* Steinman, 8 W. N. C. 296; 9 Id., 145.

[5] According to Desty's Crim. L., sec. 73 c.

[6] *Ex parte* Smith, 25 Ind. 47. See Lockwood v. State, 1 Ind. 161.

[7] Redman v. State, 28 Ind. 205; Brown v. Brown, 4 Id. 657; Withers v. State, 36 Ala. 252.

[8] Brown v. Brown, 4 Ind. 627.

[9] Smith v. Junction R. Co., 29 Ind. 546; Smith v Brown, 3 Tex. 360; Lord v. Veazie, 8 How. 254. See 4 Blackst. Com., 134.

[10] Butler v. People, 2 Col. 295.

[11] Reynolds v. Lamoint, 45 Ind. 308.

[12] Rex v. Manbey, 6 Term. R. 619. See 2 East. P. C. 821.

[13] Savings Bank v. Habel, 80 N. Y. 273.

[14] Ingle v. State, 8 Black. 574.

[15] Blythe v. State, 4 Ind. 525.

[16] Fletcher v. Daingerfield, 20 Cal. 427.

[17] *Ex parte* Garland, 4 Wall. 378; *Ex parte* Heyfron, 7 How. (Miss.) 127; Desty's Crim. L., sec. 73 c.

[18] People v. Turner, 1 Cal. 150, 151.

ests is enjoined, for one does not restrain his professional action for others. He can not be punished for contempt so long as all suspicious circumstances, if any, are explained by positive and explicit testimony.[19] But where an injunction was granted against a defendant, his servants, agents and employees, restraining them from interfering with the control by complainant of a certain house, an attorney who represented the defendant on the hearing, and who had notice of the injunction, was bound thereby. Hence he could not, by virtue of subsequent employment by other parties claiming the house, take possession of the house, or put others in it. Having done so, an order was right which required him to remove the tenants put in the house by him and return the same to the complainant, or his agents, by a specified time, or, in default, that he be imprisoned until he should do so.[20]

The lines of professional duty limit the field of contempt by attorneys. Thus it is not a contempt to read an affidavit for a change of venue, setting forth prejudice in the mind of the judge as the ground of the application.[21]

With regard to the punishment for contempt by attorneys, it has been held that the imprisonment of an attorney-at-law for contempt in failing to pay over money of his client when ordered is not imprisonment for debt, nor prohibited by the Constitution.[22]

A sheriff has been held guilty of contempt where he carelessly allowed a prisoner to escape;[23] or pocketed a venire;[24] or failed to return a writ;[25] or pertinaciously or culpably neglected to collect a debt in gold or silver;[26] or made a levy after the appointment of a receiver;[27] or was otherwise guilty of malpractice.[28]

But it is not a contempt to make a formal levy where judgment had been obtained against the receiver in an action brought with leave of the court.[29] Nor is a sheriff or marshal chargeable with contempt, according to a recent ruling, for levying on specific property when he had been indemnified therefor, although he thereby disobeyed an injunction which was of dubious import and referred to a judgment differing in date and amount from that recited in his execution.[30] This was especially the case, it was held, because he had no sufficient previous notice of such injunction. For it was laid down that where the parties concerned are easily accessible, they should be personally served with an injunction order if they are to be punished for contempt in disregarding it. The relaxation of the rule originated in cases where the party enjoined was personally present in court and knew of the injunction order being directed, but violated it before it could be entered and served.[31] In all these cases it either plainly appeared or was admitted that the persons proceeded against had full knowledge of the injunction, and either disobeyed it before the order was entered, or concealed themselves to avoid service, or were out of the State when they were duly notified; and in several of the cases full notice of the injunction was given in writing, although there was no technical service of the order itself.[32] A sheriff is not liable for contempt in failing to reinstate an ejected party upon the authority of an order staying all proceedings. This was decided in a case where the sheriff, having a writ of possession under a judgment in ejectment, went to the house of the party against whom the judgment was entered, demanded immediate possession, refused a request for delay, put the keys in his pocket, and proceeded, with an assistant, to remove the furniture. But being then served with an

[19] Slater v. Morris, 75 N. Y. 268.
[20] Phinizy v. Wimpy, S. C. Ga., Sept. 1881, 13 Cent. L. J. 257.
[21] *Ex parte* Curtis, 3 Minn. 274.
[22] Smith v. McLendon, 59 Ga. 523.
[23] Craig v. Maltbie, 1 Ga. 544.
[24] Keppele v. Williams, 1 Dall. 29.
[25] Brockway v. Wilber, 5 Johns. 356.
[26] Rice v. McClintock, Dudley (S. C.), 354; *Ex parte* Redmond, 1 Bailey (S. C.), 605.
[27] Commonwealth v. Young, 33 Leg. Int. 160; Russel v. E. A. R. Co., 1 Eng. L. & Eq. 101.
[28] *Ex parte* Summers, 5 Ired. 149; State v. Williams, 2 Speers, 26. See for foregoing statements of cases as to sheriffs, 10 Fed. Rep. 629.
[29] Wilson v. Greig, 11 Reporter, 580 (N. Y. Supreme Ct., March 11, 1881), citing 9 Vesey, 385; 7 Paige, 513; 9 Ib., 372.
[30] *In re* Carey, 10 Fed. Rep. 622, decided March 7, 1882, by District Ct., W. D. N. Y.
[31] Skip v. Harwood, 3 Atk. 564; Camell v. Collett, 3 Atk. 567; Heam v. Tennant, 14 Ves. 136; Vassandan v. Rose, 2 J. & W. 264; Kimpton v. Eve, 2 Ves. & Bea. 249; McNeil v. Garratt, 1 Cr. & Ph. 97; Hull v. Thomas, 3 Edw. Ch. 236; People v. Brown, 4 Paige, 405; Harring v. Kauffman, 2 Beav. 397; *In re* Feeney, 4 N. B. R. 233.
[32] *In re* Carey, *supra*. As to the need of serving on the sheriff the order to show cause against the issuance of an attachment, see Wheeler v. Harrison, 57 Ga. 24; Wheeler v. Thomas, Id. 161.

order staying all proceedings, he immediately told a person in the house she had better go out, and he thereupon locked the house and left a deputy in possession. It was held that the sheriff's failure thereupon to turn out the party in whose favor the judgment ran, and reinstate the other, was not a contempt of court.[33] With regard to the punishment for contempt by a sheriff, an important ruling has lately been made, where he omitted the performance of his duty by not proceeding in an execution against a Federal marshal, who had seized the goods of the wrong party. It was held that an order refusing a petition for the punishment of the sheriff, was not reviewable by the Supreme Court on *certiorari*.[34]

Concerning the purging of contempt by sheriffs, there has been an interesting decision in South Carolina. It was there declared that though a contempt by a sheriff who failed to collect money on execution and pay it over, would generally be purged only when the injured party was put in as good a position as if the sheriff had done his duty, yet here he might be discharged on inability to pay the money.[35] It was further held that in this instance the proceeding to hold for contempt was a civil process, so far as its object was to redress the party procuring it; but criminal, as being designed to punish the sheriff for neglect of duty.[36] The decision could not be generally applied without the qualification that the party charged with contempt in failing to pay over money, should not have himself voluntarily created the disability which he pleads as an excuse.[37] The case is also of importance as presenting an example of the union of civil and criminal remedies in contempt proceedings. Usually, if the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil, and he stands committed until he complies with the order. The order in such cases is not punitive but coercive. The private party alone is interested in its enforcement, and when he is satisfied the imprisonment terminates.[38]

[33] People v. Cooper, 20 Hun, 586.
[34] Schwab v. Coots, 44 Mich. 463.
[35] *Ex parte* Thurmond, 1 Bailey, 605.
[36] Ibid.
[37] See Galland v. Galland, 44 Cal. 475.
[38] Phillips v. Welch, 11 Nev. 230.

A receiver appointed by the court is guilty of contempt if he embezzles or misappropriates funds, or fails to pay them over when ordered.[39] So is a referee, under a rule of court, if he does not report.[40] An executor may also be regarded as an officer of the court, and thus held liable for failing to pay over money pursuant to a decree of distribution.[41] An executor, said the court, although holding the assets of the estate in trust, is not merely a trustee, but in one sense, an officer of the court. The court makes and may revoke his appointment, and usually all his acts are performed under or subject to the direction of the court, and have no validity until the court gives its approval. In respect to those matters in which he acts only under the direction and subject to the approval of the court, he may be regarded as an officer of the court, and no argument is needed to show that as an officer, his obedience to the orders of the court may be enforced by attachment for contempt.[42] So, a guardian will be attached for contempt where he mingles his ward's funds with his own property, and is subsequently unable to comply with a decree for the payment of the balance due the ward.[43] But a demand upon an administrator for money withheld when required by the statute, is a necessary element entering into the offense of contempt, and can not be dispensed with.[44] But opposed to the result, if not the reasoning of these decisions, is a recent ruling that the probate court has no legal authority to imprison an executor until he complies with a final order for the payment of money to the widow.[45] So, according to another late authority, an administrator is not guilty of contempt in not paying over money shown by his account to be due from him, if he reports that he has not the means to do so, and he was ready to carry out his arrangement with the parties to whom the money was due, to convey certain lands as security for his obligation.[46] A clerk of court is guilty of contempt if he fraudulently with-

[39] Cartwright's Case, 114 Mass. 230.
[40] See 20 Am. L. Reg. 88-90.
[41] *Ex parte* Smith, 53 Cal. 204.
[42] Ibid. See, also, *Ex parte* Cohn, 55 Cal. 193.
[43] Leiter's Appeal, Sup. Ct. Pa., Reporter for August 17, 1881.
[44] Haines v. People, Sup. Ct. Ill., November, 1880, Cent. L. J. addendum for Dec. 3, 1880.
[45] *Re* Leach, 51 Vt. 630.
[46] *Ex parte* Wright, 65 Ind. 504.

holds money belonging to an estate;[47] but not if he declines to turn over his books to a new appointee, pending an appeal from the order of removal upon which the selection of the substitute was based.[48]

The procedure in cases of contempt by officers of the court, the extent of the punishment and the mode of reviewing the proceedings, present no peculiar features calling for special comment. A. J. DONNER.

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[47] State v. Tipton, 1 Blackf. 166; Conner v. Archer, 1 Speers, 89.
[48] *Ex parte* Thatcher, 2 Gil. Rep. 167.

GAMBLING CONTRACTS.

The class of contracts that forms the subject of our investigation, is one that often becomes of especial interest to lawyers. The question whether a contract for the sale of grain, ostensibly to be delivered in the future, but in reality only the difference in the market price is to be paid, has of late been frequently before our courts for adjudication. The decisions have not been confined simply to fraudulent transactions in grain, but have extended to whatever is commonly bought and sold in the exchange. The different grains, stocks, shares and even money have been subjects of sales to cause litigation of this sort. The same principles underlie them all, and the court will not hesitate to apply the penalty for illegality in the one as well as the other. Operations in grain, however, are perhaps better understood than those in stocks; not that they are less complicated, but because such contracts are of daily occurrence. The actions that have brought the subject into the courts, usually have been commenced to recover "margins" deposited, or to compel payment for the article sold. The defense has been an illegal contract, and as such the question has been decided by the appellate court. Whenever the interest of the parties to the contract is merely to pay the difference in the price at the time bargained for and the time delivery is to be made, instead of an actual intent to deliver at the specified time, it may be classed as a gambling scheme. The broker usually buys or sells for future delivery, under instructions from his principal, and if a gain is the result, he pays to the principal the amount of profit. It is obvious that no grain (if it be such) actually passes, nor any evidence of any; but the whole affair is conducted upon the basis of these differences, and the gain or loss is as the market price of the article dealt in rises or falls. The query whether one could sell goods to be delivered at a future day, when he has not the goods in his possession, was passed upon at an early day, but subsequently the rule was held incorrect.[1] In that case it was held, when the vendor has neither the goods at the time of sale, nor has entertained any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but intends to go into the market and buy the article he engages to deliver, he can maintain no action upon such a contract. Under the civil law, it was not essential to the validity of the contract, that the seller should have the ownership of the thing sold.[2] The same doctrine was substantially expressed in Lorymer v. Smith,[3] decided by the same learned judge four years earlier. These two cases seem to have been among the first which laid down this principle, but Lord Tentenden's opinion upon this point was soon after expressly repudiated.[4] Since the principle laid down in the latter authorities, there have been numerous decisions, particularly in this country, holding that the vendor may contract for the sale of an article not in his possession, and this doctrine seems to be entirely in accordance with the rules of public policy.[5]

In Gregory v. Wendell, the court say: "The mercantile business of the present day could no longer be successfully carried on if merchants and dealers were unable to purchase that which as to them had no actual or

[1] Bryan v. Lewis, Ry. & Moo. 386 (1826).
[2] Bryan v. Lewis, *supra*, note *a*.
[3] 1 B. & C. 1; 2 D. & R. 23.
[4] Hibblewhite v. McMorine, 5 M. & W. 462; Mortimer v. McCallahan, 6 Id. 58.
[5] Wolcott v. Heath, 78 Ill. 433; Bran's Appeal, 55 Pa. St. 294; Brown v. Hall, 5 Lans. (N. Y) 180; Noyes v. Spaulding, 27 Vt. 420; Hibblewhite v. McMorine, 5 M. & W. 4 2; Kingsbury v. Kirwin, 43 N. Y. Superior Ct. 451; Pixley v. Boynton, 79 Ill. 351; Rumsey v. Berry, 65 Me. 570; Disborough v. Neilson, 3 Johns. Cas. 81; Cassard v. Hinman, 1 Bosw. (N. Y.) 207; Ashton v. Dakin, 4 H. & N. 867; Chapman v. Campbell, 13 Gratt. (Va.) 105; Cole v. Milmine, 88 Ill. 349; Logan v. Musick, 81 [illegible] 415; Gregory v. Wendell, 39 Mich. 340.

potential existence. A dealer has a clear right to sell and agree to deliver at some future time that which he then has not, but expects to go into the market and buy; and it is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time." Mercantile contracts of this nature are entered into every day, and there is no reason why they should not be upheld. Were the courts disposed to hold them invalid, the avenues of trade would be blocked, and the order left at the grocery for the dozen lemons, to be delivered, might in consequence be as illegal as the contract with a rolling-mill to furnish thousands of tons of iron, or with the grain dealer to ship a hundred thousand bushels of wheat. The law sees a difference and makes a distinction between a contract where there is a *bona fide* intent to fulfill the agreement according to its terms, and those where the difference in the market price is to be paid. Counsel have often advanced the argument, in actions upon contracts, when no property passes, that they are merely agreements for future delivery and should be sustained. This, as we shall hereafter see, is not the standard by which contracts of this nature are to be gauged. There can be no doubt but that sales of a commodity to be delivered at some other time are valid, but if the parties agree at the time of making the contract, that no title to any property shall pass or any delivery be made; or when, from the nature of the contract, it must be apparent the intent of the parties was such that at some future specified time the losing party should pay to the other the difference in the selling price at that time and the time of contracting, it would be a contract which the law would refuse to enforce. Such an one is clearly a wager upon the market price of a commodity at some day certain, and is oftentimes a mere cover for betting. The authorities are abundant to the effect that sales where the intent is to settle upon the basis of these differences, are void.[6]

If such a gambling transaction were entered into and so understood by both parties, then neither could maintain an action against the other, and margins once deposited could not be recovered back.[7] If either party intended it should be lawful, and entered into it with the anticipation that it was to be executed according to its terms, it must be held legitimate. There could be no gambling contract unless both parties thereto intended it to be such. Simply because the seller or purchaser has previously made illegal contracts, it does not follow that the one in controversy is void. The most notorious gambler may make a valid contract. The right to have a contract partaking of the elements of a scheme to gamble upon prices, enforced, can not be taken away, because the transaction is an illegal one, if one or the other party acted in good faith. If either has a definite legitimate purpose in entering into the bargain, he has a clear right to have his contract fulfilled.

A discrimination must also be made between time bargains and purchases for the purpose of speculation. In the latter, the object is apparent on its face, and the property is actually transferred and remains in possession of the vendee until he can sell with profit. This method of dealing is perfectly legitimate. But in the former, the article only passes nominally, hence the dissimilarity that must be noticed. If the parties desire an actual transfer of the property, there is no objection to their doing so in a legitimate and convenient manner. Warehouse receipts, or other *indicia* of property, become of advantage in a transaction of this sort, and if the article passed by this method, no court would refuse to hold the parties to their agreement. Where tho commodity is too bulky or cumbersome to admit of actual transfer, the method just mentioned comes

[6] Rumsey v. Berry, 65 Me. 574; Teekes v. Saloman, 11 Hun, 473; Grizewood v. Blane, 11 C. B. 526; Story v. Saloman, 71 N. Y. 426; Pickering v. Cease, 79 Ill. 328; Lyon v. Culbertson, 83 Id. 33; Bigelow v. Benedict, 70 N. Y. 202; Malton v. Sheen, 75 Pa. St. 166; Peabody v. Speyers, 56 N. Y. 230; Bran's Appeal, 55 Pa. St. 298; Williams v. Teidmann, 6 Mo. App. 296; Gregory v. Wendell, 39 Mich. 337; 40 Id. 432; Cassaid v. Hinman, 1 Bosw. 207; Sampson v. Shaw, 101 Mass. 145; Kirkpatrick v. Bonsall, 72 Pa. St. 155; Clark v. Foss, 7 Biss. 540; Rudolph v. Winters, 7 Neb. 125; Wateman v. Buck, 1 Mo. App. 45; *In re* Green, 7 Biss. 338; Bartlett v. Smith, 13 Fed. Rep. 263; Beveridge v. Hewitt, 8 Brad. 467; Enderby v. Gilpin, 5 Moore, 571; Swartz's Appeal, 3 Brewst. 131; Bainard v. Backus, 52 Wis. 593; Everingham v. Meighan, 15 Cent. L. J. 255. See, also, Rourke v. Short, 34 E. L. & Eq. 219; Cameron v. Durkenheim, 55 N. Y. 425; Cooke v. Davis, 53 Id. 318.

[7] Gregory v. Wendell, 39 Mich. 344; Lyon v. Culbertson, 83 Ill. 33.

within the bounds of law. In Rumsey v. Berry,[8] the court very clearly defines the line which separates the two classes of contracts; the legal from the illegal. In that case it was said: "A contract for the sale and purchase of wheat, to be delivered in good faith at a future time, is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with the understanding that, at the appointed time, the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly, and only, a betting upon the price of wheat, against public policy, and not only void, but deserving of the severest censure." A contract of this nature may be apparently valid, and show upon its face a lawful transaction, but the surrounding facts and circumstances should be examined to ascertain its true nature. That which it appears to be is not a safe criterion, and it is the province of the jury to determine whether it is a gambling scheme or a *bona fide* sale. In Kirkpatrick v. Bonsall,[9] the contract was for oil to be delivered within six months, and while the court held it was not illegal on its face, yet its character might be weighed in connection with other evidence, on the question of whether it was a gambling upon prices. To same effect is Gregory v. Wendell.[10]

There still remains a question upon which the courts are not in full harmony; whether a broker, factor, or commission merchant, who has made contracts of this nature in his own name, but for his principal's benefit, may maintain an action against the latter for money paid at his request in settling the differences due upon such sales. It has been held that the broker could not recover moneys thus expended.[11] But in England, if the broker be employed to make wager contracts at the request of his principal, and pays the amount of the difference due on such contract, he may recover it from the principal, and the illegal nature of the proceeding will be no defense to the action.[12] However, in Missouri an option deal is not a "gaming or gambling device" within the meaning of the statutes of that State, and a note given for a balance due on such a deal, may be enforced by a *bona fide* holder for value, without notice if indorsed to him before maturity.[13] But in this case it must be remembered, that the note was in the hands of a purchaser in good faith, and it would be manifest injustice to hold it void against any persons except the original parties. So also by the Illinois statute the word "option" has been defined, and means a mere choice of buying or selling.[14] "Puts," or the privilege for a nominal consideration of delivering a large quantity of grain within a certain time at a specific price, when taken by parties who are endeavoring to run a "corner," are wager contracts, and void as against public policy, and money actually paid on such a deal may be proved as a claim against the estate.[15] "Margins" are the deposits made by principals with their brokers to cover the difference in case a loss is the result of the transaction. Where one deposited a watch and chain as a margin on a deal in grain, there being no intention by either party that grain was to be delivered, *held*, the articles so deposited might be recovered in an action of trover.[16] Where an advance or loan of money for the purpose of controlling a corner in wheat, or to assist in any such illegal transaction, has been made, the law will recognize no action by which it may be recovered back.[17] Because when the money is loaned for the purpose of controlling a corner in wheat, the object is to effect an unnatural rise. Combinations to enhance the price of an article indispensable to daily comfort and convenience, have been strongly disapproved by the judiciary, and Mr. Bishop

[8] *Supra.*
[9] 72 Pa. St., 155.
[10] *Supra.* See also Barry v. McCroskey, 2 Johns. & H. 1.
[11] *In re* Green, 7 Biss. 338. See Wyman v. Fisk, 3 Allen, 238.
[12] Warren v. Billings, 33 L. J. 55; Pidgeon v. Burslun, 3 Ex. 465; Jessopp v. Surtoryche, 10 Ex. 614; Petri v. Hannay, 3 T. R. 418. The weight of authority in this country also seems to point in the same direction. Bartlett v. Smith, 13 Fed. Rep. 263; Lehmann v. Strassberger, 2 Woods, 554; Warren v. Hewitt, 45 Ga. 501; Clark v. Foss. 7 Biss. 338; Owen v. Davis, 1 Bailey, 315; Armstrong v. Toler, 11 Wheat. 294; Durant v. Burt, 98 Mass. 167.
[13] Third Nat. Bank v. Harrison, 10 Fed. Rep. 243 But see Tenny v. Foote, 95 Ill. 99.
[14] Tenny v. Foote, 4 Ill. App. 594.
[15] *Ex parte* Young, 6 Biss. 53.
[16] Dolby v. Spaids, 8 Brad. 549.
[17] Raymond v. Leavitt, 46 Mich. 447.

seems to think such a conspiracy might be punished criminally.[18] But in Rex v. Hilbers,[19] it was held there must be more than one person interested in such a transaction, before an information would be granted. It has also been held that contracts involving similar dealings with coal are void on the same ground.[20]

The real point then to be decided from the numerous decisions upon the validity of these contracts, seems to be that their legality or illegality depends upon the intent of the contracting parties. There can remain no question but that a sale for future delivery, is valid, but unless good faith is an element, the contract is a gambling one. The circumstances connected with the making of the contract, can not be too closely scanned by the presiding judge, and the real nature of the contract ascertained instead of depending upon the suppositious one. This may often be readily determined from testimony as to whether the property, or any evidence of it, passed between the parties or their brokers, or whether it was intended that there should be merely a payment of the difference in the market price at the time the commodity was apparently sold, and the time it was nominally to have been delivered to the loser.

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[18] 1 Bish. Cr. L., sec. 527, 528, and notes to 6th ed.
[19] 2 Chitty, 163.
[20] Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Arnot v. P. & Elmira Coal Co., 68 N.Y. 258.

HUSBAND AND WIFE — HUSBAND'S LIABILITY FOR WIFE'S ANTE-NUPTIAL DEBTS—COUNSEL FEES IN FORMER DIVORCE PROCEEDINGS.

MUSICK v. DODSON.

Supreme Court of Missouri, March 5, 1883.

A husband is not liable for the fee which his wife promised to pay her attorney for obtaining for her a divorce from her former husband, notwithstanding she renewed her promise to pay after her divorce was granted, and before her second marriage. Her first promise was made before her divorce was granted and while she was a married woman, and was in consequence void, and her second promise, though made while she was a *feme sole*, was based on a mere moral obligation, which can not be enforced without some previous legal liability to support it.

Appeal from Adair Circuit Court.

SHERWOOD, C. J., delivered the opinion of the court:

Action before a justice of the peace, based on the following statement: Plaintiff states that he is an attorney at law, duly licensed according to law; that heretofore, to wit, on the the —— day ————, 1877, one Louisa Allen employed plaintiff to bring and prosecute an action for divorce from her then husband, James Allen; that the cause of said divorce was that she had been deserted by her husband for more than three years before the bringing of this suit for divorce, or contracting with plaintiff to bring said suit for divorce, and that plaintiff did bring said suit, and did successfully prosecute the same, and she was divorced from her said husband; that plaintiff's services therein were reasonably worth twenty-five dollars, which amount she agreed to pay plaintiff before and after the divorce was granted, but which is due and unpaid; that afterwards, on the —— day of ————, 1878, defendant, Thomas Dodson, was duly and legally married with said Louisa Allen, and is now her husband; wherefore plaintiff prays judgment against said Thomas Dodson for said sum of twenty-five dollars and costs."

A married woman is wholly incapable of making any contract whatever which will bind her personally, or create against her a personal debt or obligation. Bauer v. Bauer, 40 Mo. 61; Higgins v. Pettzer, 49 Mo. 152. And it has been expressly decided that a married woman's promise to pay an attorney his fee for obtaining a divorce for her would not be binding upon her. Whipple v. Giles, 55 N. H. 139, s.c., 2 Cent. L. J. 484. This being the case, the engagement made with plaintiff by Mrs. Dodson, now wife of defendant, then wife of James Allen, to pay plaintiff as an attorney a certain sum for obtaining a divorce from her former husband, Allen, can not be regarded as a debt of the wife of Allen, and if not a personal debt of hers, then, according to plaintiff's own position, the defendant could not be held legally liable for any thing less than the debt of his wife contracted anterior to his marriage with her; and if Mrs. Allen could not, during the existence of the marital relations with her then husband, bind herself personally, then, as a matter of course, there could not be any consideration for the promise made by Mrs. Allen after the divorce was obtained to pay for such services, so the subsequent promise would be a *nudum pactum* and of no binding obligation or debt creating force. The case of Wilson v. Burr, 25 Wend. 386, gives support to plaintiff's position, that a moral obligation on the part of a *feme covert* is sufficient to uphold her promise made after the removal of her disability. That case is based on Lee v. Muggeridge, 5 Taunt. 36, which, Mr. Parson says, "is not law." 1 Parson on Cont. 455. It was subsequently abridged and modified in Middlefield v. Shee, 2 B. & Ad. 811, and denied in Eastwood v. Kenyon, 11 Ad. & El. 438. Denman, C. J.: "It is said by Mr. Story that when contracts are merely

voidable and not void in their inception, they may be revived by a subsequent promise, provided they were originally founded upon an express or implied request by the party benefitted. But where the contract is void *ab initio*, it is not capable of ratification. Thus, where a married woman gave a promissory note, and after her husband's death promised, in consideration of forbearance of the payee to pay it, it was held that the not was absolutely void, and that forbearance where there was no other cause of action originally, is not a sufficieut consideration to raise a promise, * * * so also when certain goods were supplied to a *feme covert* living apart from her husband, and for which, after his death, she promised to pay, it was held that the subsequent promise was void, because the goods being supplied during the life of her husband, the price constituted a debt from him and not from her." 1 Story on Cont., sec. 593, and cases cited.

Mr. Baron Parke said "a mere moral consideration is nothing." Jennings v. Brown, 9 M. & W. 501. Chancellor Kent says that the weight of authority is opposed to the view, that a "mere moral obligation is of itself a sufficient consideration for a promise, except in those cases in which a prior legal obligation or consideration had once existed." 2 Kent, 465. The doctrine of the case of Wilson v. Burr, 25 Wend. 386, was departed from in the subsequent cases of Watkins v. Halstead, 2 Sandf. 311; Smith v. Allen, 1 Lans. 101; Geer v. Archer, 2 Barb. 224, where that doctrine is repudiated; and before that case was adjudicated a different view of the law had been taken in Ehle v. Judson, 24 Wend. 97, and Smith v. Ware, 13 Johns. 257, which cases were not noticed in that on which plaintiff relies.

The view we have expressed touching the point on hand are also supported by Mills v. Waymen, 3 Pick. 207, where the subject of the sufficiency of a mere moral obligation as the basis for a subsequent promise is very clearly and elaborately discussed, and also by numerous other cases cited in the text books from which we have quoted. In Greenbaum v. Elliott, 60 Mo. 25, Wagner, C. J., delivering the opinion of the court, said: "A moral obligation, of itself, is not a good consideration for a promise. To impart to it any binding character there must be some antecedent legal liability to which it can be attached." Parsons says the rule may now be stated as follows: "A moral obligation to pay money or perform a duty is a good consideration for a promise to do so, where there was originally an obligation to pay the money or to do the duty, which was enforceable at law, but for the interference of some rule of law. Thus, a promise to pay a debt contracted during infancy, or barred by the statute of of limitations, or bankruptcy, is good, without other consideration than the previous legal obligation, but the validity of the promise, however certain, or however urgent the duty, does not of itself suffice for a consideration. In fact the rule amounts at present to little more than a permission to a party to waive certain positive rules of law wnich would protect him from a plaintiff claiming a just and legal debt." 1 Parsons on Cont., 434.

And the same learned author also remarks: "Perhaps an illustration of the rule that a moral obligation does not form a valid consideration for a promise, unless the moral duty was once a legal one, may be found in the case of a widow who promises to pay for money expended at her request, or lent to her during her marriage. It may have been held in England, in a case examined in a former note, that this promise was binding, and there are many *dicta* to that effect in this country, but the current of recent decisions in England is in favor of the view that the promise of a married woman has not, when given, any legal force, and, therefore, is not voidable but void, and can not be ratified by a subsequent promise after the coverture has ceased, nor be regarded as a sufficient consideration for a new promise." Ib. 435.

And this court has announced a similar rule in Kennedy v. Martin, 8 Mo. 678, where it was held that the subsequent promise by a widow to pay a physician for professional services rendered during her coverture was not founded upon a valuble consideration. The case at bar is not distinguishable in principle from the last case or others cited in support of our views. The case of Guinn v. Sims, 61 Mo. 335, is in accord with this one, for there the reception of the money on Sunday constituted a precedent, good consideration which might have been enforced at law through the medium of an implied promise had it not been suspended by some positive rule of law, and therefore the express promise, to wit, the mortgage, revived the precedent good consideration. 3 Bos. & Pul. 249, *supra*.

It has been ruled that a wife could, by such an agreement as that in which plaintiff has declared, bind her then husband for an attorney's fees for services rendered her in a proceeding for a divorce, instituted by the husband against her, (Porter v. Briggs, 38 Iowa, 160, and cases cited; s. c., 2 Cent. L. J. 681), but no case has gone to the extent of holding that any subsequent husband would be bound in consequence of such an agreement made by one who, at the time of making it, was the wife of another.

At the common law, if the husband had abjured the realm, or was an alien continuously abroad, these circumstances invested the wife with the protection and powers incident to a *feme sole*. Gallagher v. Delargy, 57 Mo., 29, and cases cited. And the same rule has been extended, and where the husband resided without the State of the wife's residence, he having deserted her (Abbott v. Baily, 6 Pick. 89; Gregory v. Pearce, 4 Met. 478), and the point has been ruled in the same way by this court where the wife resided separate and apart from her husband without this State. Rose Bates, 12 Mo. 30.

But these cases just cited were put upon the ex-

press ground of the coutinued intentional absence of the husband from the State, the line of jurisdiction being on a political point, an impassible barrier, and the husband being in consequence thereof as much beyond the process and jurisdiction of the courts of the wife's residence as if he had abjured the realm, or were an alien residing abroad.

This distinction is made plainly to appear in Baily v. Abbott, *supra*, where the husband, resident in New Hampshire, by cruelty drove his wife from home, who thereupon came to Massachusetts, resided there for many years, acting as a *feme sole*, and had received the note in question as the proceeds of her own labor.

These facts being set forth in plaintiff's reply to defendant's plea in abatement, that plaintiff was under coverture of Peter Abbott, who resided in New Hampshire, the defendant rejoined that the husband was a citizen of the United States, residing therein, and had not at any time renounced or abjured his allegence thereto, etc. A demurrer was interposed to this rejoinder, and Parker, C. J., discussing this point, said: "The question is whether the replication is an answer to the plea in abatement of coverture of the plaintiff. If these parties to the marriage lived within this commonwealth, it is certain that the facts stated in the replication would not avoid the plea of coverture, for by the plaintiff's expulsion from the house of her husband, she would have carried with her a credit against him to the extent of her necessary support—furthermore, might have obtained a divorce, a *mensa et thoro*, and a reasonable alimony out of his estate," and the rejoinder was adjudged bad. No such case is presented in this record, nor does the case of Gallagher v. Delargy, *supra*, cited for plaintiff, resemble the one before us, for there the husband resided in this State, where the wife resided for many years, transacting business as a *feme sole*.

True, it is alleged, that Allen deserted his wife, but this he might have done and still have resided in this State. The disposition made by the circuit court of defendant's motion to dismiss the cause was therefore correct.

Judgment affirmed.

All concur.

LANDLORD AND TENANT — REPAIRS — NEGLIGENCE—DIRECTING A VERDICT.

PERCELL v. ENGLISH.

Supreme Court of Indiana, February 16, 1883.

1. In the absence of a specific agreement there is no obligation upon the landlord arising out of the relation of landlord and tenant to repair the property and keep it in a safe and habitable condition.

2. Where the cause of action is negligence, the court may direct a verdict for defendant in cases where the evidence wholly fails to make out a *prima facie* case.

From the Marion Superior Court.

ELLIOTT, J., delivered the opinion of the court:

The case made by the appellants complaint, shortly stated, is this: She was the tenant of the appellee, having leased rooms in an upper story of a building owned by him. The approach to these rooms was by a stairway common to the use of all the tenants of the building; the railing of this stairway had been suffered to get out of repair, and was rotten and loose; the stairway became dangerous and unsafe from ice and snow which covered the steps. The appellant, in attempting to descend, slipped, and, in falling, caught the railing, which gave way, and she fell to the pavement and was seriously hurt. It will be observed that the complaint does not allege that the landlord had contracted to repair, but proceeds entirely on the theory that the duty rested upon him independently of contract.

The court, upon the close of the appellant's evidence, directed the jury to return a verdict for the defendant.

The court may, there is no doubt, direct the jury to return a verdict in favor of the defendant in a proper case. Washer v. Allenville, etc. Co., 81 Ind. 78; Weis v. City of Madison, 75 Id. 241; Haggard v. Citizens' Bank, 72 Ind. 130; Dodge v. Gaylerd, 53 Id. 365; Pleasant v. Fant, 22 Wall. 116.

When the cause of action declared on is negligence, the court may direct a verdict for the defendant, in cases where the evidence wholly fails to make out a *prima facie* case. It is true that the question of negligence is generally one of mingled law and fact, but there are cases where the question is purely one of law? Binford v. Johnson, 82 Ind. —. Where there is no dispute as to the facts, and no controversy as to the inferences that can be legitimately drawn from them, the question is one of law, and the court may rightfully take the case from the jury. 2 Thompson on Negl., 1236, 1237; Charging the Jury, 23; Toomey v. Soudan, etc., 3 C. B. (N. S.) 146.

The right of the court to withdraw the case from the jury unquestionably exists in cases where negligence is the issue, as well as in other cases; but whatever may be the character of the issue, the case can not be taken from the jury if there are any facts proved from which the jury would by fair and reasonable inference be authorized to find for plaintiff. All reasonable inferences—not, however, forced and violent ones—are to be indulged in favor of the plaintiff in such a case, for the rule is substantially the same as that which obtains in cases where there is a demurrer to the evidence. Hazard v. Citizens' Bank, 72 Ind. 136; Steinnetz v. Hogate, 42 Ind. 574; Wilcutts v. Northwestern, etc. Co., 81 Id. 30; Fitz v. Clark, 80 Id. 591. If the evidence given upon the trial of this cause can by fair intendment or reasonable inference be deemed to make out the cause of action declared on, then the appellant is entitled to a reversal. It is not sufficient even upon a demurrer to the evidence, that the plaintiff make out some cause of action. But it is incumbent upon him to make out the cause of action

set forth in his complaint. He can not declare on one cause of action and recover upon another. There is in this complaint no allegation that the appellee had agreed to keep the demised premises in repair, and, even if a contract had been proved, it is doubtful whether the appellant could have been allowed to succeed on the theory that there was a contract. But, waiving this point, and going to the evidence, we are clear that no contract was proved. The utmost that can be claimed is, that the evidence tends to show a voluntary promise, made after the contract for the letting of the premises had been entered into.

This evidence did not establish, nor tend establish, a contract on the part of the landlord to repair; for it did no more than show a mere gratuitous promise creating no binding obligation. The rule upon this subject is thus stated in a recent work: "A promise to repair made after the lease is entered into, is a mere *nudum pactum*, and no liability exists on his (the landlord's) part for a failure to make such repairs. Wood's Landlord & Tenant, sec. 382; Libby v. Talford, 48 Me. 316; Gill v. Middleton, 105 Mass. 471; s. c., 7 Am. Rep. 548; Doupe v. Grimm, 37 How. Pr. 5; s. c., 45 N. Y. 119. The case is, therefore, to be treated as one in which there is no contract on the part of the landlord to repair.

Where there is no duty, there can be no actionable negligence. Cooley Torts, 659; Addison Torts, sec. 28; Wharton Negl., sec. 3. In cases of the class to which the present belongs, three of the essential things which the plaintiff is required to establish are, the existence of a duty that is owing to him, and that it has not been performed; the material part of the appellant's case could not be made out without showing a duty owing to her from her landlord to put the demised premises in repair. The duty of the landlord to repair does not arise out of the relation of landlord and tenant; on the contrary the relation devolves that duty upon the tenant. It is only where the landlord contracts to maintain the premises in repair that he is burdened with that duty. The logical conclusion from this principle, and a more firmly settled one there is not in all the books, is that a landlord not under contract to repair is not, as a general rule, responsible to the tenant for injuries caused by a defective condition of the demised premises. In a carefully written article in the *American Law Review*, the authorities are reviewed, and the rule deduced that there is no warranty, express or implied, as to the condition of the demised premises, and that the tenant must determine for himself the safety and fitness of the premises for use and occupancy. 6 Am. Law Rev. 614; Taylor Landl. & Ten. (6th ed.), 381. This is the rule adopted by our own cases. Estep v. Estep, 23 Ind. 114, *vide* authorities cited page 116. Ordinarily, therefore, a tenant who leases property takes upon himself all risks except, perhaps, as against latent defects not discoverable by the use of ordinary diligence, and can not recover damages from his landlord because of an omission to make the premises habitable or safe. Whether a tenant would have a right to abandon the premises if the means of access to them had become unsafe and dangerous, is not here the question. The question here is whether the tenant, continuing in possession and making use of the premises, can recover damages for personal injuries caused by the unsafe condition of the means of ingress and egress. There are cases, we may remark in passing, holding that even where the landlord covenants to make repairs and fails to do so, the tenant must, where the expense is not great, make them and charge them against the landlord. Cook v. Soule, 56 N. Y. 420; Loken v. Damont, 17 Pick. 284; Miller v. Marine Church, 7 Me. 51; Benkard v. Babcock, 2 Rob. 175. The duty of the tenant to keep in safe condition for his own use the demised premises, extends to all the appurtenances connected therewith, and this includes steps, stairways and other approaches. Whatever passes to the tenant under the lease is, for the term designated, under his control and in his possession. Ponfret v. Ricroft, 1 Saunders (5th ed.) 120; Woods on Land. and Ten., sec. 213. If he neglects to make repairs and suffers the premises to become unsafe, it is clear that in ordinary cases at least, no action will lie against the landlord for injuries suffered by the tenant and caused by the unsafe condition of the premises, arising from the neglect to repair. It is obvious from this statement of fundamental principles, that in cases of an ordinary tenancy, the tenant can not maintain an action against the landlord for injuries caused by the neglect to repair the demised premises, unless the landlord has expressly covenanted to repair.

If the appellant can maintain this action, it must be because her case possesses some elements which carry it out of the general rule. The only element in this case which can with any plausibility be said to distinguish it from ordinary cases of tenancy, is that the landlord hired out apartments to separate tenants, and that the common stairway was the common passage for the use of all; it is difficult to see how this fact can exert a controlling influence upon the question of the landlord's liability; for whether the premises are demised to one or to many tenants, the principle upon which rests the landlord's immunity from the burden of repairing is not changed, nor does it change the effect of the contract by which the premises are demised. As said by a writer already referred to: "For a tenant is at once a bailee and a purchaser; he is a bailee because of his ownership being determinable and not absolute, yet being exclusive while it lasts; he is by the mere fact of demise, and in the absence of special undertaking to that effect, charged with a trust to restore the property in substantially the same condition as when he took it. 6 Am. L. Review, 614. It would seem clear on principle, that the landlord's duty is the same whether he demises to one or to many tenants, so far as concerns his liability to a tenant for personal injuries

caused by a failure to repair. In Humphrey v. Wait, 22 Up. Can. C. P. 580. The plaintiff had hired apartments of the defendant in a building occupied in part by other tenants, and sustained injuries by stepping through a hole in the floor of a common passage way, leading to the apartments, and it was held that an action could not be maintained against the landlord, and a nonsuit was directed. In the course of the opinion delivered in that case, Hagerty, C. J., said: "It would be a singular state of the law if a landlord would not be answerable if he demised the stairway with the upper story, and would be answerable if he only gave a right to use the part of the house actually demised." In Gott v. Gandy, 1 E. & B. 845, Lord Campbell said: "Now let us see what are the facts alleged. They are these: The defendant was the landlord of the premises which were let to the plaintiffs from year to year; during the tenancy the premises were in a dangerous state for want of substantial repairs; the defendant had notice from the plaintiff, and was requested to repair them and did not do so. There is no allegation of any contract to do substantial repairs. It lies therefore on the counsel of the plaintiffs, who are the actors, to establish on authority or on principle that this obligation results from the relation of landlord and tenant. Mr. Russell can produce no authority in his favor, not even a *dictum*. And I have heard no legal principle from which it would follow that the landlord was bound to repair the premises."

In Cantairs v. Taylor, 6 Ex. ch. 216, the doctrine was carried to the extent of holding that there is no liability on the part of the landlord, who himself occupied a part of the premises, unless it is shown that he was negligent with respect to the particular act which caused the injury. The English cases agree in holding that for injuries for a failure to repair, no action will lie by the tenant against the landlord. 1 Addison Torts, 240; Smith on Land. & Ten., 206; Robbins v. Jones, 15 C. B. N. S. 221; Payne v.——, H. Bl. 350.

Turning to the American authorities, we find in one of our books this statement of the rule, whether too broad or not we need not stop to inquire: "The liability of the landlord exists only in favor of persons who stand strictly upon their rights as strangers." Sherman & Redf. on Negl., sec. 503. Another author says: "An owner being out of possession and not bound to repair, is not liable in this action (*i. e.*, for nuisance) for injuries received in consequence of his neglect to repair" Wharton on Negl., sec. 817. In still another work it is said, in speaking of a landlord's liability; "Nor in the absence of a covenant to repair is he liable for injury resulting from the faulty construction or condition of the premises, the control over which is in the hands of a tenant, either to a tenant or third persons." Wood on Land. & Ten., sec. 384; 1 Thompson on Negl., sec. 323. In 14 How. Pr. 163, the action was for injuries received from falling down a stairway forming a common passage way, by one tenant occupying part of the premises, also occupied by other tenants of the same landlord, and it was held that no action could be maintained. The same general principle is declared in the cases of Doolittle v. Howard, 3 Duer. 464; Robbins v. Mount, 23 How. Pr. 24. In Kauer v. Hirste, 43 How. Pr. 161, it was held that an owner who occupied a part of the house was not liable for an injury to a visitor to one of his tenants, unless it was shown that his—the landlord's— negligence was the cause of the injury, and that the fact that he occupied a part of the premises created no presumption against him; a like doctrine is declared in Moore v. Goedell, 34 N. Y. 527. The Supreme Court of California held in the case of Loupe v. Wood, 51 Cal. 586, that there was no liability on the part of the landlord arising from the defective condition of the walls of the cellar.

We have examined the cases cited by appellant, and do not find any of them in point. The cases in the Georgia Reports are not in point, because they are founded upon an express statute making it the duty of the landlord to repair. The cases of Godley v. Hagarty, 27 Conn. 631, and House v. Metcalf, 276 Conn. 600, were actions by a stranger, and are therefore not in point. Fisher v. Thralkeld, 21 Mich. 1; s. c., 4 Am. R. 422, is against rather than in favor of the appellant. In that case the landlord was held not to be liable to one who suffered an injury by falling through a scuttle on a sidewalk adjoining premises in the possession of a tenant. The other case cited (that of Schindelbeck v. Moon, 32 Ohio St. 264; s. c., 30 Am. R. 584), is also against the doctrine maintained by counsel. In that case the injury was occasioned by the accumulation of ice upon steps leading into a store room owned by the defendant, but occupied by a tenant; and the holding was that the landlord was not liable for injuries sustained by a stranger. In closing the opinion it was said: "And again it was the ice that occasioned the accident. It was not averred that it was the duty of landlord to remove this ice, nor does it appear that he was called upon to do it. If this ice was a nuisance to the passing public, endangering their lives and limbs, it was a nuisance arising during the continuance of the lease. It was a thing temporary in its nature, a defective condition of things such as the tenant was called upon to remedy and not the landlord, as between landlord and tenant." We have in our investigation found one case which lends support to the general doctrine for which appellant's counsel contend. The case to which we refer is Looney v. McLean, 129 Mass. 33; s. c., 37 Am. R. 295. In that case the wife of the tenant of a part of a tenement house, occupied by several families, was injured by the giving away of one of the steps of the stairway leading to the roof of a shed used in common by the tenants for the purpose of drying clothes, and it was held that an action would lie against the landlord.

The question is not discussed, and only cases from Massachusetts are cited, and they do not

decide the point. On the contrary, such of them as apply to the relation of landlord and tenant recognize the rule that the landlord is not liable to the tenant for a failure to repair. Two of them do not touch upon the subject of a landlord's liability. One of the two is upon the question of the re-liability of a railroad company which constructs a passage-way across a public street, and the other is upon the same general question; but, conceding the soundness of the ruling in that case, it does not apply to the case at bar, for here the cause of the injury was not the defective construction of the stairway, or its unsafe condition at the time the premises were leased. The stairway here is directly connected with the part of the premises leased to the appellant. In the Massachusetts case it was otherwise. Here the thing which made the stairway unsafe was the temporary covering of snow and ice, while in the Massachusetts case the unsafe condition was permanent, and had long existed. It is not necessary for us in the present case to lay down any general rule upon the subject of a landlord's liability to a tenant occupying apartments in a tenement house occupied by other tenants. It is sufficient for us to ascertain and state a rule governing cases such as that made by the evidence before us. We are satisfied the authorities warrant us in adjudging that where a stairway connected with the apartments hired in a tenement house occupied by several tenants is rendered unsafe by temporary causes, such as the accumulation of snow and ice. The landlord is not liable to the tenant who uses such a stairway with a full knowledge of its dangerous condition, unless there is a contract on the part of the landlord to keep the premises in repair and fit for safe use. Any other rule would entail upon landlords a grievous and unjust burden, cast upon them a duty which long-settled rules has imposed upon the tenants,and results in imperilling the interests of an owner out of possession, and relieve those in possession of his property from that care which the law imposes upon bailees and others occupying analagous positions. If any other rule is adopted, then the owner is charged with the duty of watching steps leading to every part of the premises, and of keeping them free from all temporary obstructions; for let it once be granted that the landlord is liable for obstructions or defects not permanent, and not growing out of the character of the structure, it will be impossible to draw any line, and he must be held accountable for all obstructions and defects, no matter how transient their character. Whether a landlord hiring apartments to many tenants is liable for latent defects or for faults in the construction, or for permanent defects in the common passageways, we do not decide. The evidence before us shows that the ice and snow made the stairway unsafe and caused the accident. But for the ice and snow which the tenant could have removed with very little labor, or at a trifling expense, the appellant could have used the stairway in perfect safety. We are satisfied that the court below was right in holding that the cause of the accident was the accumulation of the ice and snow upon the stairway, and that for an injury resulting from such a cause, a landlord who had made no covenant to repair, is not liable.

Judgment affirmed.

INSANITY—EVIDENCE—INSURANCE.

KAROW v. CONTINENTAL INS. CO.

Supreme Court of Wisconsin.

1. Where the only evidence tending to prove insanity is the commission of a given crime, such act of itself is not sufficient to establish insanity. But where the suicide of the assured is immediately preceded by the murder, or attempted murder, of members of his family, and the destruction of his property without any apparent motive or provocation, it is evidence to be considered by the jury on the question of the insanity of the assured.

2. Where there is nothing in the policy to the contrary, the insurance company is not relieved from liability because the property was burned by the assured while in a state of insanity, nor unless the burning was caused by the voluntary act, assent, procurement or design of the assured.

Appeal from the Circuit Court of Winnebago County.

G. W. Burnell, for appellants; *C. W. Felker*, for respondents.

The plaintiffs are the daughters, only heirs-at-law and legal representatives of John Wiskow, who is claimed to have died January 12, 1881. This action is upon two fire insurance policies, issued by the defendant to him in his lifetime, upon the buildings constituting his homestead, for the sum of $1,150. It is claimed, and for the purposes of this case, we must regard the facts as established, that at about half-past six o'clock in the evening of January 12, 1881, the assured, John Wiskow, struck and severely injured one of the plaintiffs, then killed his wife, and then set fire to the buildings above mentioned, and then either killed himself or allowed himself to perish in the flames of one of the buildings. At the close of the trial, under the charge of the court, the jury returned a special verdict, to the effect that John Wiskow was dead; that he set fire to the buildings; and was not insane when he did it. The plaintiffs moved for judgment, on the ground that the defendant had waived the defense of the building being burned by Wiskow, but the motion was denied, and the plaintiffs excepted. Judgment was thereupon entered upon the special verdict in favor of the defendants, from which this appeal is brought.

CASSODAY, J., delivered the opinion of the court:

Assuming that the defendant called for proofs of loss, yet we do not think such call was made

with such knowledge of the facts as to waive the defense alleged, that the assured burned his own buildings. In submitting the question of insanity, the court, in effect, charged the jury that they must look outside of the commission of the act with which the assured was charged, and could only find him insane from other and independent testimony in no way connected or associated with the crime. Assuming that the plaintiffs had the right to have the question of insanity submitted to the jury, then the mental condition of Wiskow at the time of the burning was the material subject of inquiry. Certainly his acts being of the character indicated, tended to show what his mental condition was at that time. It is undoubtedly the law, that where the only evidence tending to prove insanity is the commission of a given crime, such act of itself is not sufficient to establish insanity. The mere fact that a man commits suicide, does not even raise a presumption of insanity at the time. It is, however, a fact which, in connection with other evidence, becomes very pertinent to the issue. Especially is this so where the suicide is immediately preceded by the murder, or attempted murder, of members of the suicide's family, and the destruction of his property without any apparent motive, or even provocation. The rule is elementary, and must exist from the very nature of the question to be determined. The learned counsel for the defendant virtually concedes the rule. For this manifest error in the charge, therefore, the case must be reversed, unless the determination of the question of insanity was immaterial, as urged by counsel for the defendant. He claims that the burning of the building by the assured, relieved the company from all liability, regardless of the question whether he was at the time sane or insane, and such seems to have been the opinion of the court during a portion of the trial. The question is important, and the principal one discussed upon the argument. Counsel on both sides concede their inability to find any adjudicated case directly in point. Upon the part of the plaintiffs, it is urged that the case is the same, in principle, as the liability of a life insurance company when the assured has committed suicide; and he cites several cases which hold, in effect, that if the assured was insane at the time of the suicide, then the company is liable, otherwise not. On the other hand, it is claimed upon the part of the defense, that those cases have no application to fire insurance; that the two classes of contracts are essentially different; that a policy of fire insurance is a contract of indemnity—a contract for compensation for damages actually sustained; whereas a policy of life insurance is a contract to pay a certain sum of money upon the death of a person named, which is sure to happen, and that such payment is to be made, regardless of the value or worthlessness of the life insured. Having thus distinguished the two classes of cases, the learned counsel contends that while an insane person can not be guilty of a crime, nor liable for a tort wherein the intent is a necessary ingredient, yet that a lunatic has always been held liable for other torts resulting in damage. In support of this, counsel cite several cases, and argue from them that if a lunatic burns the building of A, he is liable to A for the amount of the actual damages sustained, and that since this is so, it must follow that a lunatic can not burn his own buildings, upon which he has previously obtained an insurance, and then turn round and recover of the insurer the damages he has sustained by reason of his own act. The argument is plausible, and deserves very careful consideration, especially in the absence of any direct authority upon the question involved. In order to appreciate its force, it may be well to consider the precise ground upon which such liability is predicated. Kron v. Schoonmaker, 3 Barb. 650, was an action for false imprisonment on void process issued by the defendant when a lunatic, and Judge Harris stated the rule thus: "He (a lunatic) is not a free agent, capable of intelligent, voluntary actions, and therefore is incapable of a guilty intent, which is the very essence of crime; but a civil action, to recover damages for an injury, may be maintained against him, because the intent with which the act is done is not material. * * * * Ordinarily, in an action for a personal injury, the amount of damages is, at least to a considerable extent, governed by the motive which influenced the party in committing the act. * * * * But in respect to the lunatic, as he has properly no will, it follows that the only proper measure of damages in an action against him for a wrong, is the mere compensation of the party injured." In Morse v. Crawford, 17 Vt. 499, the defendant, while insane, killed the plaintiff's ox, and in an action against him therefor, the court said: "It is a common principle, that a lunatic is liable for any tort which he may commit, though he is not punishable criminally. When one receives an injury from the act of another, this is a trespass, though done by mistake, or without design. Consequently, no reason can be assigned why a lunatic should not be held liable." To the same effect, Behrens v. McKenzie, 23 Iowa, 333. In Beals v. See, 10 Pa. St. 61, Chief Justice Gibson said: "As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it." This was quoted approvingly in Lancaster v. Moore, 78 Pa. St. 413, and is substantially the ground of liability, as stated in Cooley on Torts, pages 99-103. Thus the liability is made in no way dependent upon intent or design to commit the act complained of, but is based on the theory that the lunatic has no will, hence can form no design nor have any intent. It is solely upon the ground, that where a loss must fall upon one of two persons equally innocent, it must be borne by the one who caused it. To relieve the defendant from liability upon the

strength of the above authorities, therefore, we must go to the extent of holding that there can be no recovery in such case, if the destruction of the property was in consequence of any act of the assured, unmoved and unprompted by any intent or design, and when such assured was, in legal contemplation, without any will of his own, and hence incapable of forming any design or having any intent to destroy. Is such the law of fire insurance? It is conceded that there is no express stipulation in the policy relieving the company from liability in such case. But it is a maxim of the insurance law of all commercial nations, that the assured can not recover for loss produced by his own wrongful act. Thompson v. Hopper, 6 Ellis and Blackburn, 191. This brings us to the question whether he can recover, if he happens to set fire to the building without any intent or design to injure anyone. In the absence of fraud or design, there can be no question but that a fire insurance company is not relieved from liability on its policy by reason of loss by fire through the negligence of the assured or his servants. Dobson v. Sotheby, 1 Moody & Malkin, 90; Busk v. The Royal Exchange, 2 Barn. & Ald. 73; Walker v. Maitland 5 Id. 171; Shaw v. Robberds, 6 Adol. & El. 75; Catlin v. Springfield, 1 Sumner, 434; Columbian v. Lawrence, 10 Pet. 507: Waters v. The Merchants, 11 Pet. 213; St. Louis v. Glasgow, 8 Mo. 713; Nelson v. Suffolk, 8 Cush. 477; Gates v. The Madison, 5 N. Y. 469; Matthews v. The Howard, 11 N. Y. 14; Huckins v. The Peoples, 11 Foster, 427; Johnson v. Berkshire, 4 Allen, 388; Mickey v. Ins. Co., 35 Iowa, 174; Cumberland v. Douglass, 58 Pa. St. 423; National v. Webster, 83 Ill. 470; Gove v. The Farmers', 48 N. H. 41.

In Dodson v. Sotheby, *supra*, Lord Tenterden, C. J., said, that "one of the the great objects of insuring is security against the negligence of servants and workman. In Shaw v. Robberts, *supra*, Lord Denman, C. J., reiterated the same doctrine, and added: "But it is argued that there is a distinction between the negligence of servants or strangers and that of the assured himself. We do not see any ground for such distinction; and are of opinion that in the absence of all fraud, the proximate cause of the loss only is to be looked to." Page 84. In Gates v. The Madison, *supra*, the court states, that: "There can be no doubt that one of the objects of insurance against fire is to protect the insured from loss, as well against his own negligence, as that of his servants, and others, and therefore the simple fact of negligence in either, however great in degree, has never been held to be a defense in such policy." Page 478. In Mickey v. Ins. Co., *supra*, the stove pipe passed from below through the floor of the second story. The pipe in the second story was removed and a bed placed over the hole by the assured's wife, with the intention of removing the stove below, but which was not done. Subsequently the weather became colder, she made fire in the stove without thinking of the removed pipe and the bed above. The result was that the house was consumed, and the company was held liable. In Cumberland v. Douglas, *supra*, Mr. Justice Story said: "A fire policy is a protection against fire caused by the assured's own negligence, unless the negligence amounts to fraud." In Breasted v. The Farmers', 8 N. Y. 306, it was, as here, urged, in an action on a life insurance policy "that because a person *non compos mentis* is liable *civiliter*, for torts committed while in a state of insanity, therefore insanity has no effect to qualify this exception (if he shall die by his own hands) in the policy, that conclusion is not a legitimate deduction from the premises. * * * * A death by accident and a death by the party's own hand when deprived of reason, stand on principle in the same category. In both cases the act is done without a controlling mind." Of course negligence involves a want of care in one who ought to bestow care. It is an omission of duty. But the law imposes no duty, no obligation of care, upon one who has no control over his mental faculties, and hence no control over his physical action. Being under no obligation of care, and under no restraint of duty, and incapable of exercising either, it would be inapt, if not inaccurate, to say that by his omission, an insane peason was guilty of negligence. Since burning through the negligence of an insured who is sane, does not relieve the company from liability, for a much stronger reason the same act by one who is incapable of care, would not. But while the negligent burning by the assured of his own property, does not relieve the company from liability, yet the negligent burning of another person's property would subject him to damages on the ground of negligence. So, while the burning of his own property by an assured under no restraint of duty and incapable of care and without any intent or design, does not relieve the company from liability, yet the same act of burning another's property might subject such person to damages therefor, not on the ground of negligence, as that word is usually understood, but in the language of Chief Justice Gibson, *supra*, "on the principle that where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it." For the reasons given it follows as a logical sequence, that the nonliability of a fire insurance company can not be predicated upon the fact that the act of burning by the assured, if done to the property of another instead of his own, would have made him liable in damages. The authorities holding a lunatic liable for the actual damage occasioned by his torts, therefore, furnish no ground for relieving the defendant from liability in the case before us. The act of burning the property of another necessarily destroys the property burned, and injures the owner to the extent of its value. But the act of burning one's own property does not necessarily injure an insurance company. Whether it does or not, depends upon whether the company has for the time being assumed the risk of such burning. It is because the company, for a con-

sideration paid, has, for the time being, assumed the risk of the burning, and hence relieved the owner from such risk, that the liability continues, even where the burning is by the assured's own negligence, or that of his agents or servants. Such policy covers all risks from loss by fire not excepted therefrom, not affected by the intent, design or procurement of the assured. Such being the risk which the defendant here by its contract expressly assumed, it can not be relieved therefrom merely because the assured burned the property, if it is made to appear that at the time of such burning, the assured was incapable of forming a design or intention to injure. Counsel for the defendant concedes that if the assured was insane at the time, then he could not be guilty of a crime nor liable for a tort wherein the intent is a necessary ingredient. The authorities cited by him fully support the concession, and hold that a lunatic "is not a free agent, capable of intelligent, voluntary actions, and therefore is incapable of a guilty intent." The same authorities substantially hold that a lunatic has, properly, no will—but acts without design, and is influenced by no motive. Can the act of such a person, even in the burning of his own property, relieve an insurance company from a risk which he has paid it for assuming? In Gove v. Farmer's, *supra*, the wife of the assured, while insane and alone in the house, burned his buildings, and it was there held, that "the defendants will be liable for the loss, unless they can show actual design or such a degree of negligence or carelessness on the part of the husband, as will evince a corrupt design or a fraudulent purpose on his part." After citing authorities indirectly bearing upon the question, the learned judge, giving the opinion of the court in that case, said: "It appears to us it would be a misnomer of terms that she, being admitted to be in this state (insane), could so far control her reasoning powers as to be able to plan or design the act done by her beforehand, in such a manner as to render herself responsible as a moral agent. The word insane implies unsoundness or derangement of mind or intellect, not a mere temporary or slight delirium, which might be occasioned by fever or accident; and we can not attach moral accountability to a wrongful act admitted to be done by any insane person." The court then considered the question, whether the company was relieved by the husband's negligence in leaving his wife alone in the house while in the condition stated, and concluded that it was not. Applying to that case the rule in respect to negligence sanctioned by Lord Denman, *supra*, there is no distinction between the act of the assured and his servants, and assuming that a wife left by her husband alone and in charge of his house, is, as to its care and custody, the servant, if not the agent, of the husband, and it follows, that if such burning by her while insane will not relieve the company, then neither would such burning by him while insane relieve the company. Of course, such act of burning by such insane wife, was not, under the authorities cited, a criminal act, but at most a tort committed without any design or intent to injure, and by one incapable of controlling her reasoning powers, and hence incapable of planning or designing such act in advance, or comprehending its consequences, especially to the insurance company. Such burning by such insane wife, being a mere tort of the character indicated, was, therefore, imputable to the husband, for it is well settled, that the husband is liable for the torts of his wife. Head v. Briseo, 5 C. & P. 484; Heckle v. Luvey, 101 Mass. 344; Fowler v. Chichester, 26 Ohio St. 9; Ball v. Benett, 21 Ind. 427; Brazil v. Moran, 3 Minn. 236; Hildreth v. Camp, 41 N. J. L. 306. And he may be arrested therefor. Solomon v. Wads, 2 Hilton, 179; Schraus v. Putscher, 25 How. Pr. 463. Such being the law it is evident, that had such insane wife burned the house of a neighbor, instead of the house of her husband, the husband would, on the principle of the authorities cited, have been liable for the tort; but having burned her husband's house, and such risk of burning, having, for value received, been expressly assumed by the insurance company, for the very purpose of relieving the assured therefrom, it would seem that the case was rightly decided. Whether the criminal act of intentional burning by a sane wife, without the knowledge, privity or consent of the husband, would relieve the company from liability to him, need not be here considered. In the recent case of Midland Ins. Co. v. Smith, L. R. 6 Q. B. Div. 561; s. c., 29 English (Moaks), 710, the company sought to cancel the policy held by the husband for such act of criminal burning by the wife, but a demurrer to the bill was sustained. It was there observed, that "the loss or damage caused by the wrongful act of the wife, either is or is not a loss which the company have agreed to indemnify the husband against; now if it is such a loss, an attempt by the company to enforce against the husband a return, indemnity or reimbursement, is at variance with the very substance of their undertaking to indemnify him; if, on the other hand, the loss, by reason of its having arisen from the act of the wife, is not within the risks and losses caused by the policy, then this action is as wholly misconceived, unnecessary and unfounded, as if loss had been caused by any other risk not covered by the policy." The court continued and gave opinion upon the "real and substantial contention in the part of the insurance company," although conceding that it did not and could not arise in the case, as follows: "I have no hesitation in saying, that it appears to me to be upon principle perfectly clear and free from doubt, that such a loss would be covered by an ordinary policy against loss caused by fire. Under such a policy the company would be liable for every loss caused by fire, unless the fire itself was caused and procured by the wilful act of the assured himself, or some one acting with his privity and consent. In order to escape from responsibility for such a loss

as the present, the company ought to introduce into their policy an express exception." The substance of the decisions seems to be that a fire policy covers all risks of loss or damage by fire, save only such as are excepted by the terms of the policy and such as are caused by the voluntary act, assent, procurement or design of the assured himself. In this respect the law of fire insurance seems to be in harmony with the law of life insurance. In Horn v. the Anglo-Australian, 7 Jurist (N. S.), 673, Vice Chancellor Wood said: "It appears to me clear, that where there is no express provision in the policy, that in the event of the assured dying by his own hand the policy shall become void, that policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity." This seems to be the acknowledged law of life insurance. May, sec. 323. Such being the law of life insurance, a clause is usually inserted in the policy to the effect that the insurer will not be liable in case the insured should "die by suicide, feloniously or otherwise, sane or insane." But even then these words are only held to include cases of intentional self-destruction and not unintentional or accidental deaths, though brought about by the acts of the deceased involving negligence or carelessness. Pierce v. The Travelers, 34 Wis. 381. In The Knickerbocker v. Peters, 42 Md. 414. it was held that suicide by the insured while "in a fit of insanity which overpowered his consciousness, reason and will," did not come within the clause exempting the company in case the assured should "die by his own hand or act." See also Penfold v. The Universal, 85 N. Y. 317, and cases cited by counsel for the plaintiff. But as already suggested, in the policy before us, there is no exception from liability in case the assured should burn the property feloniously or otherwise, sane or insane, nor anything of that nature. For the reasons given we must hold that where, as here, there is nothing in the policy to the contrary, the insurance company is not relieved from liability because the property was burned by the assured while in a state of insanity, nor unless the burning was caused by the voluntary act, assent, procurement or design of the assured. What has already been said in regard to the charge of the court to the jury, renders it unnecessary to apply the principle there suggested to the alleged error in excluding the expert testimony, as the same ruling is not likely to be repeated.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

WEEKLY DIGEST OF RECENT CASES.

1. CONTRACT — CONSIDERATION FOR CONFESSED JUDGMENT—DEBT OF ANOTHER.

Where a creditor, in consideration of obtaining a confessed judgment from his debtor, agrees to pay the claim of another creditor, the contract is such a one as will support an action by the latter against the promissor. *Roth v. Barner*, S. C. Pa., Oct. 2, 1882; 12 W. N. C., 523.

2. CONTRACT—CONSIDERATION—ILLEGALITY.

Where one sold another a horse in 1863 to be used in the Confederate army, taking a note for the same; and after the war was over the parties met, one bringing the horse and the other the note, and the then value of the horse was determined by selected arbitrators, the old note taken up and a new note taken; there was no illegality of consideration in said new note, and a verdict against its maker is sustained. *Murphy v. Weems*, S. C. Ga., Dec. 5, 1882.

3. CONTRACT — FOR SALE OF LANDS—FAILURE OF CONSIDERATION—RESCISSION—LIMITATIONS.

Complainant entered into a contract to sell certain lands to the county, acting through its commissioners, who accepted a deed therefor, which was placed by them on record. The property was purchased for the use of the county for a poor-house and farm, and possession taken immediately by the county authorities, and the land has been improved and used for that purpose continuously ever since. A portion of the consideration was to be paid in county orders drawn upon the county treasurer, and the balance to be paid in four equal annual instalments, the deferred payments being secured by notes and mortgage. *Held*, that where the agreement between the parties, so far as it relates to the time and mode of payment, has failed by reason of the legal disability of the county to perform its part according to the conditions of the contract of sale, for the reason that the county had no authority to issue bonds for such purpose, the vendor had a right to rescind the contract, and to a restitution of the title, on condition of the surrender of the void securities on the part of the vendor. The claim against the county for the purchase money, on the supposition that the understanding had been to accept payment according to the terms of the statute, is not liable to the bar of the statute of limitations, and the obligation of the county to pay is not extinguished by the statutory lapse of time. Although the right of complainant to rescind the contract and demand a reconveyance accrued at the date of the deed, he was not bound to exercise the right, and his cause of action did not accrue until he had made manifest his election. *Chapman v. Douglas County*, U. S. S. C., Feb. 5, 1883; 2 S. C. Rep., 62.

4. CONSTITUTIONAL LAW—INTERSTATE COMMERCE —TOBACCO INSPECTION LAWS.

Section 41 of chapter 346 of the Laws of Maryland of 1864, as amended and re-enacted by chap. 291 of the laws of 1870, provides as follows: "After

the passage of this act, it shall not be lawful to carry out of this State, in hogsheads, any tobacco raised in this State, except in hogsheads which shall have been inspected, passed, and marked agreeably to the provisions of this act, unless such tobacco shall have been inspected and passed before this act goes into operation; and any person violating the provisions of this section shall forfeit and pay the sum of $300, which may be recovered in any court of law of this State, and which shall go to the credit of the tobacco fund: *Provided*, that nothing herein contained shall be construed to prohibit any grower of tobacco, or any purchaser thereof, who may pack the same in the county or neighborhood where grown, from exporting or carrying out of this State any such tobacco without having the same opened for inspection; but such tobacco so exported or carried out of this State without inspection shall in all cases be marked with the name in full of the owner thereof, and the place of residence of such owner, and shall be liable to the same charge of outage and storage as in other cases; and any person who shall carry or send out of this State any such tobacco without having it so marked, shall be subject to the penalty prescribed by this section." Under that proviso, no requirement of the act of 1864 is dispensed with, except that of having the hogshead opened for inspection. The hogshead must still be delivered at a State tobacco warehouse, and there numbered and recorded, and weighed and marked, and be found to be of the dimensions prescribed by statute, and to have been packed and marked as required. Said section 41, as so amended and re-enacted, is not, in its provisions as to charge for outage and storage, in violation of clause 2 of section 10 of article 1 of the Constitution of the United States, as respects any impost or duty imposed by it on exports, or in violation of the clause of section 8 of article 1, which gives power to the Congress "to regulate commerce with foreign nations and among the several States." The charge for outage, under the proviso of said section 41, as so amended and re-enacted, is an inspection duty, within the meaning of the Constitution. Dispensing with an opening for inspection of the hogsheads mentioned in said proviso, does not, in view of the other provisions of the tobacco inspection statutes of Maryland, deprive those statutes of the character of inspection laws. The characteristics of inspection laws, considered with reference to the legislation of the American Colonies and the States on the subject. It is not foreign to the character of an inspection law to require every hogshead of tobacco to be brought to a State tobacco warehouse. Whether it is not exclusively the province of Congress, and not at all that of a court, to decide whether a charge or duty, under an inspection law, is or is not excessive, *quære*. Said section 41, as so amended and re-enacted, is not a regulation of commerce or unconstitutional, as discriminating between the State buyer and manufacturer of leaf tobacco, and the purchaser who buys for the purpose of transporting the tobacco to another State or to a foreign country, or as discriminating between different classes of exporters of tobacco. The charge for outage in this case appears to be a charge for services properly rendered. *Turner v. State*, U. S. S. C., Feb. 5, 1883; 2 S. C. Rep. 44.

. DAMAGES—MEASURE OF, IN LIBEL CASES.

The court will not grant a new trial in actions for libel on the ground of excessive damages, unless the amount is so flagrantly atrocious and extravagant as manifestly to show that the jury must have been actuated by passion, partiality, prejudice or corruption. *Mallory v. Bennett*, U. S. C. C., S. D. N. Y., Feb. 22, 1883; 15 Rep., 321.

6. EVIDENCE—EXPERTS IN REAL ESTATE—"MORE OR LESS" IN DEED.

The opinions of witnesses are not competent to show that the words "more or less" would include a deficiency of eight or nine feet in a city lot. *Wylly v. Gazan*, S. C. Ga. Feb., 1883; 15 Rep., 331.

7. EVIDENCE—EXPERT TESTIMONY—CROSS-EXAMINATION.

A witness who is shown to have been a twenty-years graduate of a reputable college of physicians and surgeons, and subsequently to have served as surgeon in the army for nearly three years, may be examined as an expert surgeon. A witness can not be cross-examined as an expert when he has not so testified in chief. *Olmstead v. Gere*, S. C. Pa.; 12 W. N. C., 521.

8. HOMESTEAD—BANKRUPTCY—FAILURE TO APPLY TO HAVE IT ASSIGNED.

1. A homestead allowed by the laws of this State to the head of a family, and recognized by the bankrupt laws of Congress, which has been set apart by the District Court of the United States, to one adjudged a bankrupt, is liable to a debt contracted by him since his final discharge, where he has failed to have the homestead as- signed by the proper State courts in the manner prescribed by the Constitution and laws of this State. 2. The only effect which the legislation of Congress has upon the title to the property reserved as a homestead is to prevent it from passing to the assignee in bankruptcy and thus to withdraw it from the jurisdiction of the bankrupt court, leaving it where it was before the proceedings in bankruptcy were commenced. This tribunal is deprived thereby of the power of administering it as a part of the estate of the bankrupt. *Felker v. Crane*, S. C. Ga., March 13, 1883.

9. INSURANCE—NOTICE—FORFEITURE.

Where there is a wide variance between the notice actually given and the one required by the terms of a policy of insurance, both in the amount required to be paid and the time of payment, such notice can not work a forfeiture. *Mut. Indowment Ass'n v. Essender*, Md. Ct. App., 10 Md. L. Rec., No. 3.

10. INSURANCE, LIFE—POLICY FOR BENEFIT OF CHILD—FATHER'S INTEREST IN POLICY.

A father who has insured his life for the benefit of his daughter, and has made the policy payable on his decease "to her, her executors," etc., can not take to himself upon her death the interest in the policy; it will go to her repressntatives, and a court of equity will decree the surrender of the policy to the representatives. *Glanz v. Gloeckler*, S. C. Ill., Nov. 20, 1882; 15 Rep., 334.

11. JURY TRIAL—COMPETENCY OF JURORS—INTEREST.

Citizens of a town are competent jurors in cases in which their municipal corporation is interested; and striking such citizens from the jury, over objection, was sueh error as to necessitate a new trial, the evidence not imperatively demanding the verdict. *Mayor, etc. of Cartersville v. Lyon*, S. C. Ga., Dec. 5, 1882.

12. MUNICIPAL BONDS—ILLEGAL ISSUE AS A DEFENSE—BONA FIDE HOLDER.

That municipal bonds are void because issued without authority, may be set up as a defense against a *bona fide* holder for value who purchased such bonds in the open market without notice of any defense thereto. As counties in the State of Illinois are authorized to subscribe stock to aid and construct railroads, and issue bonds to pay such subscriptions, and the board of supervisors of such counties are empowered by law to issue such bonds, the bonds in controversy in this case, issued by the board of supervisors of Kankakee County for subscription to the capital stock of the Kankakee & Illinois River Railroad Company, are valid. *Kankakee County v. Ætna L. Ins. Co.*, U. S. S. C., Feb. 5, 1883; 2 S. C. Rep. 80.

13. NOTICE—UNRECORDED MORTGAGE— QUANTUM OF PROOF.

It is well settled that to establish notice of an unrecorded mortgage the proof ought to be explicit and satisfactory. *Frostburg Mut. Bldg. Assn. v. Willison*, Md. Ct. App., 10 Md. L. Rec. No. 3.

14. PRACTICE—DISQUALIFICATION OF JUDGE.

The fact that the judge who tried this case was a director in the defendant's company when the contract sued on was made, does not disqualify him, he not being connected with defendant in any way at the time of the trial, either as director or stockholder. *Johnson v. Marietta*, S. C. Ga., March 13, 1883.

15. PATENTS—DOORS AND CASINGS OF SAFES—PUBLIC USE.

Whether claim 3 of letters patent No. 67,046, granted to Joseph L. Hall, July 23, 1867, for an "improvement in connecting doors and casings of safes," namely, "(3) The conical or tapering arbors, 1, in combination with two or more plates of metal, in the doors and casings of safes and other secure receptacles, the arbors being secured in place in the plates by keys 2, or in other substantial manner," claims arbors which are tapped into two more plates, or whether it excludes, as a part of it, screw-threads cut on the arbors, is immaterial in the present case, because, under the former view, the defendants are not shown to have used arbors with screw-threads on any part of the arbor that is within the plates, and, under the latter view, the claim is invalid. The whole invention existed in letters patent granted to said Hall, September 25, 1860, for an "improvement in locks." A cored conical bolt with a screw-thread on it having been shown in the patent of 1860, and a solid conical bolt having existed, there was no invention in adding the screw-thread to the latter bolt. Solid conical bolts without screw-threads having been used in two safes made and sold by the inventor more than two years before the patent was applied for, the invention covered by said claim was in public use and on sale, with the consent and allowance of the inventor, so as to make such claim invalid under sections 7 and 16 of the act of July 4, 1836 (5 St. at Large, 117), and section 7 of the act of March 3, 1839 (Id. 353). Such use was not a use for experiment. *Hall v. Macneale*, U. S. S. C., Feb. 5, 1883; 2 S. C. Rep., 73.

16. SERVICE OF PROCESS—PUBLICATION—MECHANIC'S LIEN.

Where, in an action for the foreclosure of a mechanic's lien, notice is given by publication, and the name published as the name of the defendant differs substantially from his true name, the notice is insufficient to confer jurisdiction, *e. g.*, where the true name was T. P. B. Hopkins, and the name as published was P. T. B. Hopkins. *Fanning v. Krapfl*, S. C. Iowa, January, 1883; 15 Rep., 335.

RECENT LEGAL LITERATURE.

FEDERAL REPORTER, Vol. XIII. Cases Argued and Determined in the Circuit and District Courts of the United States. August-November, 1882. Robert Desty, Editor. St. Paul, Minn. 1882: West Publishing Co.

We have heretofore spoken of the scope and plan of this excellent series (13 Cent. L. J. 280). Although this periodical has a practical monopoly of the field which it occupies, since nowhere else are the cases here reported to be found collected, yet the original standard of excellence which won for it at its inception a cordial welcome from the profession has been carefully maintained. Its present editor, Mr. Robert Desty, is a gentleman of very considerable literary experience and reputation as a legal author upon topics connected with the administration of justice in the Federal courts, among which are Federal Citations, The Federal Constitution, Federal Procedure, [Shipping and Admiralty, and Commerce and Navigation. The preparation of these works has been a most exceptionally fortunate training for the duties of his present position, and the consequent advantages to the reader are perceptible in every number of the work.

Another valuable feature is the notes which are appended to the reports of the more important cases, which in very many instances are written by eminent legal literateurs, and are really exhaustive essays upon the topics treated. Altogether, we should regard the publication as indispensable to those lawyers whose practice to any considerable degree lies in the Federal courts.

SUPREME COURT REPORTER, Being a Supplement to the Federal Reporter, and Containing all the Current Decisions of the Supreme Court of the United States. Robert Desty, Editor. October Term, 1882. St. Paul, Minn., 1883: West Publishing Co.

The object of this publication, which is so intimately connected with the preceding as to be properly termed a supplement to it, is to supply the profession with a reliable report of the decisions of the Supreme Court of the United States as soon as possible after they are rendered. The importance of this end to the profession is manifest, and the success which has been accorded to the efforts of the same editorial and business management in the case of the *Federal Reporter* is a happy augury of its prosperity and usefulness. The two publications together cover the whole

ground of the decisions of the Federal courts. The cases are admirably reported; the *syllabi* are precise and thorough. The numbers are issued promptly after the filing of the opinions as often as there is enough material on hand to make a number, whether that be twice a week, once a week, or once a month. This feature of promptness is an advantage, which will commend itself to every practitioner. The paper, typography and press work are excellent, and the general appearance quite handsome. The subscription price is $5 per annum.

MISSOURI REPORTS. Reports of Cases Argued and Determined in the Supreme Court of the State of Missouri. Thomas K. Skinker, Reporter. Vol. 75. Kansas City, 1883: Ramsey, Millett & Hudson.

This volume includes cases decided at the October Term, 1881, continued from volume 74; April Term, 1882; and part of the October Term, 1882. Mr. Skinker seems to be materially shortening the gap between the filing of the opinions and the issue of the volume from the press, and we congratulate him upon the success of his efforts in that direction. The present volume is very handsome in appearance, and exhibits evidences of painstaking labor on the part of the reporter.

NOTES.

——It is not a little curious to notice how persistently democratic communities seek to lower the remuneration and social position of persons in the employment of the State. Every member of the community looks on a government official, no matter what his status, as his private and peculiar servant, and the bulk of such a community seems disposed to lay stress on the most galling points of this relation whenever an opportunity offers. In our own Parliament many patriots consider the *honorarium* received by members as a standard by which to judge all other rewards, and not a professional salary runs the gauntlet of the Assembly without rousing a note of righteous indignation from some honorable gentleman who is credibly informed that a competent man could be got for half the money. It is to be noticed that the fact that the community generally is wealthy, and that large fortunes are being made every day by men of equal calibre in kindred businesses and professions outside the public service, by no means checks this tendency; on the contrary, it seems to increase it. Here is the latest example from the United States of America, where the judges of the Supreme Court are paid the munificent sum of £2,000 a year, or less than half that which is paid to a puisne judge in England, and less than two-thirds of the amount received by the Chief Justice in Victoria. Says a Washington letter to the *Philadelphia Press*: "For high-toned perquisites privileges and luxuries, the jolly old owls on the Supreme Court bench would take the premium at the world's fair—they would take the cake, the oven, the baker and the farmer's wheat field. In the first place, every one of the judges has a room in his house furnished by the Government luxuriously—a perfect library in itself. The walls are covered with book-cases filled with law books of great value and usefulness; the floors are richly carpeted, a great massive desk occupies the center of the room, morrocco lounges and easy chairs invite you to repose, and the body servant is just without the door awaiting the tinkle of the silver bell. These, including the body servants, are paid for out of Uncle Sam's pouch. If you go to dine with a judge, or a secretary or an assistant secretary, or an assistant anything, or a senator, behind your chair you will probably find a waiter, paid for by the Government as a messenger or laborer. Each judge has his own man. The Supreme Court has more officers and men than any similar institution in the world thrice over. One thing the judges have not, except on days of ceremony, and this is carriages. Many, indeed nearly all of them, drive their own private carriages, but in all other respects they are about like cabinet officers, except more so. With $10,000 a year and pension when they retire, with a library, a body servant, three or six months vacation every year, and the respect of all mankind, the Supreme Court judges can walk along the flowery paths leading to old age with the jolly idea that they are lucky as well as wise."—*Australian Law Times.*

——The newspaper discussion in this State as to the incomes realized by members of the legal profession appears to have attracted attention in other sections. The Ratcliff Hicks' Troupe of Starving Meriden Lawyers but briefly preceded the appearance before the public of the New Haven $400 On-an-Average Combination. Boston has been heard from, and it seems that there is material there for opposition troupes. An Advertiser reporter interviewed an old and successful practitioner, who said that in that large city a few made over $5,000, and about one-quarter of the profession just about that sum. Rent collectors, special attorneys and agents cut into the legal business, and no regular practicing lawyer gets much practice until thirty. "A good many lawyers pick up $1,500 to $2,000, many work at other things to help support them. Some live from hand to mouth, and some nearly starve. A few young lawyers just admitted, who have fathers or relatives already prominent in the profession, go in with them, and find enough to do. A good many, by slow degrees, build up a fair practice for themselves. Some keep an office for a few years and do nothing, and then drift into some other occupation. Some go west, and some go to the devil." —*Hartford (Ct.) Courant.*